

ENHANCING THE SC MEDICAID CLASS ACTION DRUG RECOUPMENT PROCESS

SOUTH CAROLINA DEPARTMENT OF HEALTH & HUMAN SERVICES
CERTIFIED PUBLIC MANAGER PROJECT
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February 4, 2014

Background:

The South Carolina Medicaid program, as established by the Title XIX of the Social Security Act, utilizes State and Federal funds to ensure quality health care to low income residents of South Carolina. The Department of Health & Human Services (SCDHHS) is the single State agency designated to administer the Medicaid program. In the Department of Health & Human Services 2012 Actuarial Report, researchers indicated that Federal and State governments spent \$432.4 billion collectively for Medicaid in fiscal year 2011. They also indicated that 95% of the Medicaid 2011 expenditures were for medical assistance payments (DHHS 2012 Actuarial Report, pg. 13).

The overall purpose of the State Medicaid Third Party Liability program (TPL) is to ensure that State and Federal funds are not expended for covered services to eligible South Carolina Medicaid Beneficiaries (SCMB) when another source is liable for those services. To ensure that the Medicaid program is the payer of last resort, the federal government (42 U.S.C. 1396k (a)(25) mandates that all states take reasonable measures to discover third party resources available to Medicaid Beneficiaries. The State must conduct diagnosis and trauma code edits on Medicaid claims to identify potential casualty and liability coverage. The recoveries obtain through the State's reasonable measure efforts are essential for helping reduce the Medicaid program's operating expenditures.

The Casualty Department within SCDHHS is charged with the authority to seek and collect reimbursements from liable third parties who caused injury to the SCMB. South Carolina Code §43-7-410 annotated defines third party as any individual, entity, or program that is or may be responsible for all or part of the medical cost for an applicant or beneficiary.

According to South Carolina Code §43-7-420, the Medicaid Beneficiary (MB) made an assignment to the State Health & Human Services only to the extent of the amount of medical assistance paid by Medicaid and shall be deemed to have assigned their rights to recover such amounts so paid by Medicaid from any third party to the State Department of Health & Human Services. The Casualty Department seeks recoveries from various types of beneficiary involved accidents to include auto accidents, medical malpractice, slip and fall, crime victims, school accidents and class action cases. A class action, global or multi-class action law suit evolves when multiple claimants in multiple states bring a legal action against the drug manufacturer for alleged injuries received as a result of taking the medication for its prescribed purpose. Historically, the class action case recoupment process in the Casualty Department begins when SCDHHS is notified by the attorney of the MB involvement in the class action law suit litigation.

Problem Statement:

A class action case lead audit was conducted by the Casualty Department in an attempt to identify Medicaid Beneficiaries who ingested a specific class action drug and they also received medical treatment specific to those caused by the class action drug. The results of the audit revealed a large number of MB who took the drug, received injury related treatment, but they were not active participants in the Global Class Action Law Suits. The Casualty Department active cases averaged about 2% of the MB identified through the audit.

The goal of this project is to further enhance the current class action recoupment process and to increase revenue for SCDHHS. My plan is to utilize the current internal data reporting sources within SCDHHS to help identify SCMB who meet the minimum class action drug law suit requirements but they are not or have not notified SCDHHS of their participation through

the current class action operational procedures. Once the potential class action claimants are identified, reasonable efforts will be made to recoup the injury related claims paid on behalf of the Beneficiary for the Medicaid Program.

Data Collection:

The current class action process limits SCDHHS's ability to pursue recoupment against a liable third party until after the agency has been notified of the Beneficiary's involvement in the class action lawsuit. Normally, the plaintiff attorney or the Lien Resolution Group (LRG) sends notification of the MB's pending action and requests the State's paid claims detail report of medical related charges. Once established, the case information is downloaded into the department's case management file system. The Casualty Department's Case Management System (CDCMS) has limited data retention capabilities. The CDCMS retains case lead source information; the diary activities for open case files and the closed/archived case file data. Therefore, the system is incapable of producing the data necessary to pursue missing or omitted class action claimant information.

The Mass Tort Qualified Protective Order (QPO) is a court document that identifies the class action case type, the class action prescription drug name and the compensable injury related claims. The QPO document also identifies the parties to whom the court assigned the authority to gather the Beneficiary's injury related claims information. QPO requirements were met for the Seroquel and Avandia class action drug cases. Seroquel and Avandia are prescribed to Beneficiaries with mental challenges; however, both drugs caused Beneficiaries to develop diabetes or pancreatitis. The class action subset parameters were established incorporating the drug name, the primary and the secondary injury related diagnosis codes.

The Truven Health Analytics System is the SCDHHS reporting repository for current and archived Medicaid Management Information System (MMIS) and Medicaid Eligibility Determination System (MEDS) data. The Truven Analytic tools are Advantage Suite and Data Probe. These tools enabled ad hoc reporting queries from the MMIS and the MEDS systems. The Advantage Suite and the Data Probe systems specialize in:

- (1) End-user scripting capabilities to improve analytic productivity;
- (2) Works with large volumes of Fee for Service (FFS) data;
- (3) Provides analytic functions to subset data reporting of clinical conditions-such as asthma, diabetes and cancer.

The class action subset query data was matched with the Truven Analytics data repository of all SCMB eligibility and paid medical claims information to determine the missing or involuntary class action Beneficiaries identified for this project. The data was refined multiple times utilizing multiple parameter subsets to test the reliability and the validity of the data. If the project is implemented by the Department, it could reduce the Medicaid program expenditures; it could enhance the class action case identification and recoupment process and it could ultimately increase the Department's revenue through increased recoveries.

Data Analysis:

The Casualty staff can create reports on data previously downloaded into the case management system. Although the current standards of operation are effective, the subset enhancement data revealed a missing population of potential class action claimants. The subset data was analyzed by comparing the results with the class action case information extrapolated

from the Casualty Case Management System (CCMS). The case list report identified the number of active class action cases by case type maintained in the department. Based upon the current class action recoupment process, the Casualty Department had 315 active Seroquel cases. The subset search revealed 3118 potential Seroquel class action claimants. The Avandia active case count totaled 279 but the subset identified 3061 potential claimants who met the minimum requirements. To validate the data results, additional subsets of class action data were analyzed and refined to help substantiate the process and the results. The other class action drug subsets analyzed were Risperdaal, HRT, Vioxx, and Yaz. The analyzed subset results were 2833 potential Risperdal claimants versus one active class action case. The HRT subset identified 1132 potential claimants versus 41 open active case files. The Vioxx data subset identified 995 potential claimants. There were 387 open active Vioxx cases held in the department. The Yaz search revealed 412 potential claimants and there were 32 open active cases at the time of this analysis (Appendix A). The subset parameter search results were consistent and in each scenario identified an excessive number of claimants in each drug category search meeting the minimum standards compared to the open active case files held in the department. Since the Seroquel class action cases in the department had already settled and closed, we calculated the average case value by dividing the number of Seroquel cases by the total case claim values.

Total Seroquel Case Value \$720,793.39 / Total Seroquel Cases 315 = Average Case Value \$2,288.24

Seroquel Subset Total Cases 3118 x \$2,288.24 = \$7,134,732.32

The potential class action recoupment case value calculations of \$7,134,732.32 provided additional motivation for moving forward with the project. The Medicaid Program would benefit substantially if the project is successful.

The current class action case management process meets the federal qualifications of reasonable measures once the Department is notified by the attorney however; (1) The process includes multiple data analytic steps to verify class action claims data inclusion. (2) The audit negotiation process is labor intensive and requires continuous back and forth movement between SCDHHS staff and the class action attorneys before an agreement can be reached. (3) The class action settlement holdback is an agreed upon amount of 20% that Medicare allows the LRG to withhold from the settlement for satisfaction of both Medicare and Medicaid's claim. The biggest issue with the holdback amount is if there is a Medicare and a Medicaid claim, Medicare's claim is superior to Medicaid's claim. There have been instances when there were no remaining funds for the Department's claim recovery once Medicare's claim is satisfied. (4) The current process also impedes recoupment of our full claim when an additional of statutory reduction of 25% is allowed to assist the Beneficiary with their attorney fees and costs. (5) The current class action process included 50 operational processing steps from inception to case conclusion. The process wastes identified through the Lean Six Sigma project eliminated multiple operational processing steps, thus experiencing a 78% process improvement. However, additional improvements would be realized through this project.

The first suggested area of improvement is the class action claimant identification process. The department would no longer rely upon the current notification system. Staff would initiate the class action process through ad hoc reports utilizing the query capabilities readily

available through the Truven Health Analytic system. Casualty staff would create subset queries to identify potential claimants. The resulting claimant list would be pursued for potential recoupment of the paid claims.

The second area of improvement would be in the enforcement of the Medicaid Program subrogation and assignment of rights against liable third parties. In adherence to Code of Federal Regulations 433.137 and 42 USC 1396k, a Bill passed by the South Carolina Senate on June 2, 1986, provided for Medicaid the assignment and subrogation of any Medicaid applicant's claim for reimbursement for Medicaid services from third parties to the State Health & Human Services. South Carolina Statute 43-7-430(A) says the State shall be automatically subrogated only to the extent of the amount of medical assistance paid by Medicaid, to the rights an applicant may have to recover such amounts paid by Medicaid from any liable third party. In Section 43-7-440 (A)(2), the Department, to enforce its assignment or subrogation rights, may commence and prosecute legal proceedings against any third party who may be liable to any applicant in state or federal court, either alone or in conjunction with the applicant.

To enhance the current class action recoupment process, SCDHHS must begin initiating legal proceedings against drug manufacturers whose product caused injury to a MB. SCDHHS must begin initiating legal proceedings on behalf of the MB to recover all medical payments expended as a result of the class action drug injury.

The third improvement involves the assistance of an outsourced legal group. SCDHHS would contract the class action recoupment process out to an attorney or a law firm with class action litigation experience. The contract attorney would act on behalf of SCDHHS in litigation, mediation, and other proceedings to recoup all injury related claims paid on behalf of the MB.

The contract attorneys would be compensated for their services on a contingency fee basis. The contingency fee basis means the contract attorney would be paid a percentage of the settlement when they prevail in court or settle a class action law suit.

These improvements to the current class action process would eliminate the current process redundancies and would allow streamlining of the process. The class action notification process currently in place within the department would not change however; the process would remain under continual evaluation for additional procedural improvements.

Implementation Plan:

The data analysis results and improvement plans were discussed with the Department's Chief Financial Officer (CFO) and the Third Party Liability (TPL) Division Director. The initial project stakeholders include the SCDHHS Office of General Counsel, the TPL program Director, the Casualty department program manager and a Casualty department case analyst. Upper management support for the project was received during the Lean Six Sigma project presentations. The stakeholder concerns for implementing the project were (1) what would be the best methodology for ensuring that the rights and privacy of the SCMB is protected throughout the class action process. There were HIPAA requirements that must be adhered to at all times when accessing and /or disseminating Beneficiary information; (2) since the office of General Counsel was already under staffed and over utilized, what expenses are associated with implementing and operating the project.

The stakeholders' project concerns were sufficiently addressed. First, the Department would enforce its subrogation and assignment authority to attempt collection of any and all

medical payments expended on the MB's behalf. All IT safe guards currently used to protect Beneficiary Protected Health Information (PHI), to include data encryption, would be enforced throughout this project. Secondly, a project feasibility cost analysis report compared the cost of the Department hiring two Staff Attorney IV FTE positions in the Office of General Counsel versus contracting the project work out to attorney with class action litigation experience. My cost analysis results confirmed the cost effectiveness of the Department employing the services of a contract attorney or group. The Department would incur minimal project implementation costs if the contract attorney services are utilized.

After several months of discussions with the stakeholders, the decision was made to move the project forward. There were several telephone conversations with interested parties. A meeting date was scheduled in the SCDHHS Office of General Counsel for October 7, 2013. Prior to the meeting, the attorneys requested that another class action data analysis report be generated from the Truven system for two new class action drug cases currently in litigation. The attorneys wanted confirmation that SCDHHS has the ability to provide credible information on future cases. The Data Analytic Intake form was completed and submitted to the Office of Reporting, Research, and Special Projects for the Abilify and Plavix (Exhibit B) class action drugs. The attorneys provided the subset data parameters for the new search prior to the meeting. The search resulted in 3603 potential Abilify claimants with a dollar value of over \$15,000,000.00 and 3606 Plavix claimants with a dollar value of over \$16,000,000.00 based upon the identified class action injuries.

During the meeting, the attorneys were briefed on the class action project objectives. They were also given the opportunity to examine and analyze the class action data and reports

retrieved from the Truven Health Analytic System. The Abilify and Plavix results were shared with the attorneys during the meeting. The greatest obstacle in moving forward with this project concerns the review of claims data. The research data only included specific diagnosed claims information. These reports in their current form would provide adequate data upon which to base the recoupment initiatives. However, there could be additional paid claims for each beneficiary that does not show on the diagnosis report. Future project discussions must include the detailed level of each MB injury related claims history and the most appropriate method for extraction and or redaction of the reported information.

The attorneys, in turn, discussed what they felt would be the main project obstacle which is the timeliness of filing each class action law suit. Since there is a statute of limitation (SOL) for filing a claim for damages once the class action settlement has been awarded, all actions conveyed on behalf of the Department must be initiated within three years of the class action settlement award date. The attorneys have agreed to conduct research to determine which class action settlements are still available for recoupment by DHHS. Their class action settlement availability report will be given during the next meeting. After the project discussions, the attorneys were given the opportunity to address our request for services.

The attorneys were asked to prepare their proposed request for services contract for review and approval by upper management. The attorneys have remained in telephone contact with DHHS since the initial meeting. They have requested additional state statute and specific contract requirement information. The continued dialog indicates the attorneys' continued interest in the project. The next group meeting will be scheduled within 30 days of this project submission.

Upon approval of the contract attorneys' proposal for services, the final component of the implementation plan will be a procedural training session. The training will discuss the specific duties and responsibilities of the contractor and those required by SCDHHS. The data exchange format, the reporting requirements, and also the fees and costs compensation plan, reimbursement schedule, and documentation requirements will be outlined in the training.

Evaluation Method:

The preliminary project evaluations have indicated that there is a missing population of SCMB for whom SCDHHS has the potential to recoup injury related paid claims. Additional evaluations will be made as class action litigations are settled. However, the current data is sufficient for the agency to move forward with the project.

The measurable for this project will include (1) analysis of additional potential case leads; (2) monthly progress reports for each class action case type; (3) monthly class action recoupment reports; and (4) a cost savings analysis report measures the Department's costs savings specific to each case. The monthly progress reports must include the specific actions taken and the current status of each class action case. The report must also identify any claimants added to or deleted from the class action law suit and the case value. The class action recoupment report must include all class action revenue received by case type. The report must detail the total settlement less Medicaid expenditures disbursed for attorney fees and costs. The final analysis report will compare the cost savings benefit for the contract attorney services compared to payments to individual plaintiff attorneys.

Summary and Recommendation:

The discovery of potential revenue enhancements for the Department is critical and could not be timelier during the current budget atmosphere. The Center for Medicaid & Medicare Services (CMS) has challenged the state level Medicaid programs to identify and implement new standard operating recoupment procedures. Every dollar in increased revenue is essential for the continued success of the Medicaid program. As a result of our previous efforts, in December 2013, SCDHHS received a check for \$1,728,024.00 from The South Carolina Attorney General's Office. The attached documentation indicated the check was for an Avandia Class Action settlement reimbursement to the Department. The CFO for SCDHHS verified that the reimbursement was as a result of this project and also indicated it had been posted to the appropriate reimbursement ledger account for the Department. The implementation of the class action recoupment project would not only be beneficial financially to SCDHHS, but implementing the project would also improve TPL operating standards and set legal precedence for other states to follow. My recommendation is that within the next 90 days, the attorney contract request receives upper management approval to progress the project in to full operation.

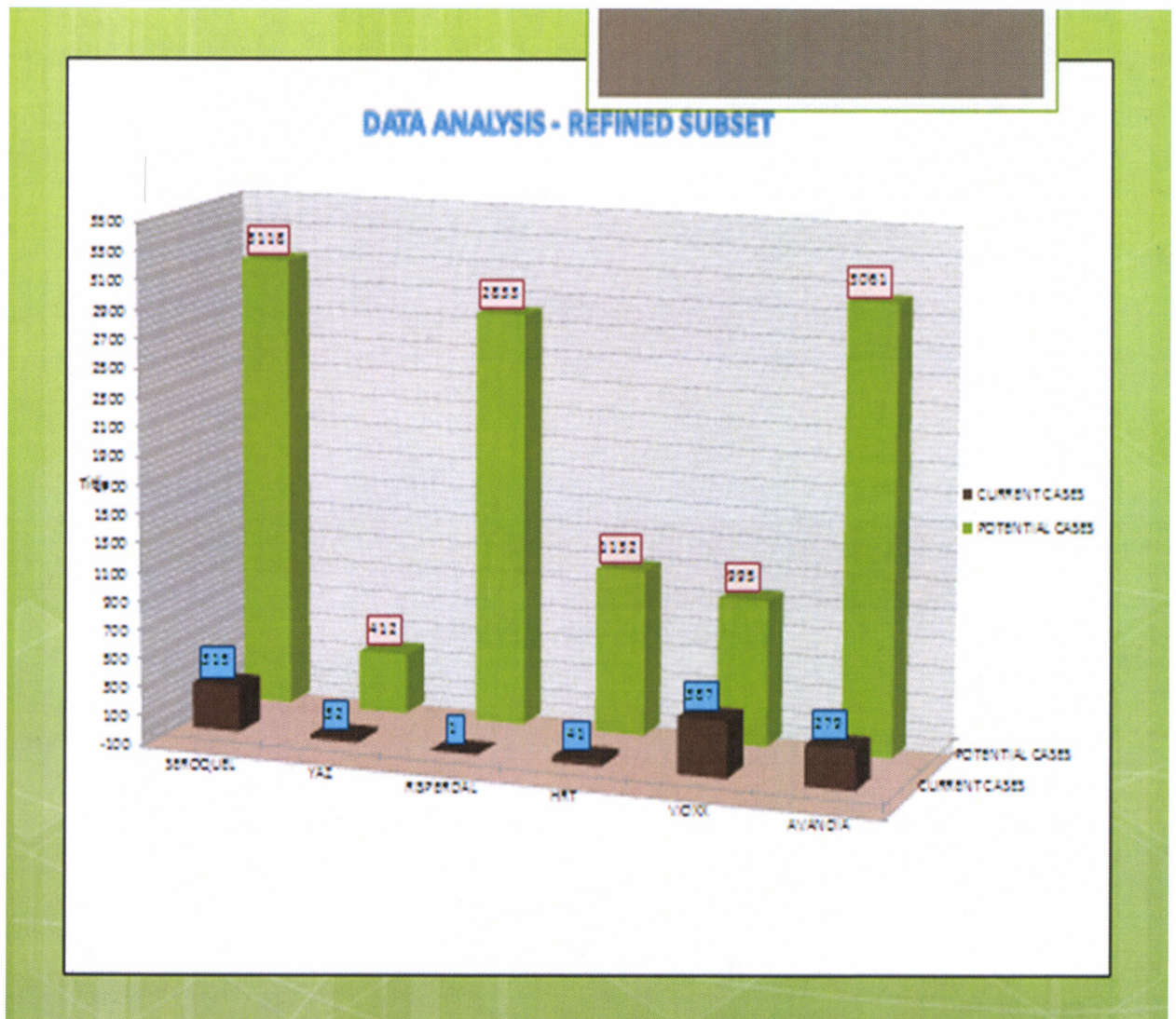
References:

Department of Health & Human Services, 2012 Actuarial Report on the financial outlook for Medicaid.

Retrieved from <http://medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Financing-and-Reimbursement/Medicaid.html>

Social Security Act 1902(a)(25), 42 U.S.C. 1396a(a)(25)

Appendix A



Appendix B

Data Analytic Intake Form

South Carolina Department of Health and Human Services

Categorized Type
of Report:

Select

PMO Project
Name:

Class Action Recoupment Project

Project #:

Project

Project
Description:

The Class Action Recoupment project's goal is to recoup funds paid on behalf of Medicaid Beneficiaries who were injured by a class action drug.

Requested by:

Angela West-Barnett

Request Date:

9/13,

Purpose:

To obtain information on specific fee for service claims paid for individuals who took the drug Plavix and had an injury of heart attack, intestinal bleeding, stroke, ulcers or Thrombotic Thrombocytopenic Purpura (TTP).

Due Date:

9/24,

Program Area:

Select an Area within Office of Director & General Counsel

or Select an Area within Office of Information Management

or Select an Area within Office of Finance & Administration

or Select an Area within Office of Medicaid & Managed Care Services

or Select an Area within Office of Community Long Term Care

or Other (Please Specify)